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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KEVIN FERNANDEZ,) 3:12-cv-00401-LRH (WGC)

Plaintiff,)

vs.)

DR. CENTRIC, et. al.)

Defendants.)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiff's Motion for Temporary Restraining Order (Doc. # 5)¹ and Preliminary Injunction (Doc. # 6).² Defendants opposed (Doc. # 12) and Plaintiff replied (Doc. # 27). In addition, Plaintiff was granted leave to file various supplemental briefs in support of his position. (See Doc. # 28-1, Doc. # 71-1.) After a thorough review, the court recommends that Plaintiff's request for injunctive relief be denied.

I. BACKGROUND

At all relevant times, Plaintiff Kevin Fernandez was an inmate in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Compl. (Doc. # 4) at 1.)³ The allegations giving rise to this action took place while Plaintiff was housed at Northern Nevada Correctional Center

¹ Refers to the court's docket number.

² Doc. # 6 and Doc. # 7 are identical, but were docketed separately by the Clerk's Office.

³ A motion for leave to amend the Complaint is currently pending and will be addressed in a separate order. (See Doc. # 72.)

1 (NNCC). (*Id.*) Plaintiff is currently housed at Ely State Prison (ESP). (*Id.*) Plaintiff, a pro se
 2 litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are Dr. Ronald
 3 Centric, Greg Cox, Susan Fritz, Dr. Karen Gedney⁴, David Konrad, Jack Palmer, Dr. John Scott,
 4 Elizabeth Walsh, and Robert Schober.⁵ Plaintiff has also named various doe defendants that
 5 have not yet been identified.⁶

6 Plaintiff asserts claims against Defendants under the First, Eighth, and Fourteenth
 7 Amendments in connection with his placement in the Mental Health Unit (MHU) at NNCC,
 8 being labeled mentally ill, being subjected to treatment for mental illness through therapy, and
 9 involuntary administration of anti-psychotic prescription drugs. (Doc. # 4.)

10 Plaintiff now seeks an order enjoining Defendants from labeling Plaintiff as mentally
 11 impaired or mentally ill, from admitting Plaintiff into the MHU or other mental health facility,
 12 and from attempting to prescribe anti-psychotic drugs to him against his will without first
 13 providing him the due process protections outlined in *Vitek v. Jones*, 445 U.S. 480 (1980), and
 14 *Washington v. Harper*, 494 U.S. 210 (1990). (Docs. # 5, # 6 at 1.) In addition, Plaintiff wants
 15 the foregoing to be subject to this court's approval during the pendency of this matter. (*Id.*)

16 Defendants oppose the request for injunctive relief, arguing that Plaintiff's request is
 17 moot because: (1) he is no longer housed at NNCC, and with the exception of defendant Cox,
 18 the request for injunctive relief is directed towards individuals at NNCC; (2) Plaintiff has not
 19 been prescribed any anti-psychotic drugs since January 10, 2012, and that prescription expired
 20 on February 10, 2012; (3) Plaintiff was discharged from the MHU, and physicians orders since
 21 that date do not contain a reference to mental health housing; and (4) Plaintiff is not currently
 22 labeled as mentally ill. (Doc. # 12.)

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25 ⁴Erroneously identified by Plaintiff in the Complaint as Dr. Gentney. (See Errata at Doc. # 93.)

26 ⁵Erroneously identified by Plaintiff in the Complaint as Sergeant Chubert. (See Errata at Doc. # 92.)

27 ⁶A motion for leave to amend to substitute in the names of various doe defendants is currently pending
 28 and will be addressed in a separate order. (See Docs. # 86, # 91.)

II. LEGAL STANDARD

The purpose of a preliminary injunction or temporary restraining order is to preserve the status quo if the balance of equities so heavily favors the moving party that justice requires the court to intervene to secure the positions until the merits of the action are ultimately determined. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is an “extraordinary and drastic remedy” that is “never awarded as of right.” *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). Instead, in every case, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 23 (2008) (internal quotation marks and citation omitted). The instant motion requires that the court determine whether Plaintiff has established the following: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id.* at 20 (citations omitted).

15 Before *Winter*, courts in the Ninth Circuit applied an alternative “sliding-scale” test for
16 issuing a preliminary injunction that allowed the movant to offset the weakness of a showing
17 on one factor with the strength of another. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d
18 1127, 1131 (9th Cir. 2011). In *Winter*, the Supreme Court did not directly address the continued
19 validity of the Ninth Circuit’s sliding-scale approach to preliminary injunctions. *See Winter*,
20 555 U.S. at 51 (Ginsburg, J., dissenting): “[C]ourts have evaluated claims for equitable relief on
21 a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the
22 likelihood of success is very high...This Court has never rejected that formulation, and I do not
23 believe it does so today.”); *see also Alliance*, 632 F.3d at 1131. Instead, the portion of the
24 sliding-scale test that allowed injunctive relief upon the possibility, as opposed to likelihood,
25 of irreparable injury to the plaintiff, was expressly overruled by *Winter*. *See Stormans, Inc. v.*
26 *Selectky*, 586 F.3d 1109, 1127 (9th Cir. 2009). The Ninth Circuit has since found that post-
27 *Winter*, this circuit’s sliding-scale approach, or “serious questions” test “survives...when

1 applied as part of the four-element *Winter* test.” *Alliance*, 632 F.3d at 1131-32. “In other words,
 2 ‘serious questions going to the merits’ and a hardship balance that tips sharply toward the
 3 plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter*
 4 test are also met.” *Id.*

5 An even more stringent standard is applied where mandatory, as opposed to prohibitory
 6 preliminary relief is sought. The Ninth Circuit has noted that although the same general
 7 principles inform the court’s analysis, “[w]here a party seeks mandatory preliminary relief that
 8 goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious
 9 about issuing a preliminary injunction.” *Martin v. International Olympic Committee*, 740
 10 F.2d 670, 675 (9th Cir. 1984) (citation omitted). Thus, an award of mandatory preliminary
 11 relief is not to be granted unless both the facts and the law clearly favor the moving party and
 12 extreme or very serious damage will result. *See Anderson v. United States*, 612 F.2d 1112, 1115
 13 (9th Cir. 1979) (citations omitted). “[I]n doubtful cases” a mandatory injunction will not issue.
 14 *Id.*

15 Finally, the Prison Litigation Reform Act (PLRA) mandates that prisoner litigants must
 16 satisfy additional requirements when seeking preliminary injunctive relief against prison
 17 officials. The PLRA provides, in relevant part:

18 Preliminary injunctive relief must be narrowly drawn, extend no
 19 further than necessary to correct the harm the court finds requires
 20 preliminary relief, and be the least intrusive means necessary to
 21 correct that harm. The court shall give substantial weight to any
 22 adverse impact on public safety or the operation of a criminal
 23 justice system caused by the preliminary relief and shall respect the
 24 principles of comity set out in paragraph (1)(B) in tailoring any
 25 preliminary relief.
 26 18 U.S.C. § 3626(a)(2). Thus, § 3626(a)(2) limits the court’s power to grant preliminary
 27 injunctive relief to inmates. *See Gilmore v. People of the State of California*, 220 F.3d 987, 998
 28 (9th Cir. 2000). “Section 3626(a)...operates simultaneously to restrict the equity jurisdiction
 of federal courts and to protect the bargaining power of prison administrators-no longer may
 courts grant or approve relief that binds prison administrators to do more than the
 constitutional minimum.” *Id.* at 999.

The standard for issuing a temporary restraining order is identical to the standard for preliminary injunction. *See Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Moreover, it is appropriate to treat a non-ex parte motion for a temporary restraining order and preliminary injunction as a motion for a preliminary injunction. *See* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2951 (2d ed. 2007) (“When the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that on an application for a preliminary injunction and the proceeding is not subject to any special requirements.”).

III. DISCUSSION

11. A. Likelihood of success on the merits

In order to be granted a preliminary injunction, Plaintiff must show he is likely to succeed on the merits of a claim that would entitle him to the equitable remedy he seeks. *Winter*, 555 U.S. at 20.

1. Fourteenth Amendment Procedural Due Process-Count II

In Count II, Plaintiff claims that his placement in the MHU and being labeled mentally ill had stigmatizing consequences. Additionally, he alleges he was subjected to mandatory mental health treatment while in the MHU. Plaintiff claims he did not receive notice of the January 2, 2012 hearing before he was placed in the MHU. He also alleges that at the hearing, he was not able to present witnesses or cross-examine witnesses, did not have an independent decision maker, did not receive a written statement regarding his placement in the MHU and did not have the availability of qualified assistance. Plaintiff claims that these same infirmities existed at the January 5, 2012 hearing. He further asserts that on January 10, 2012, Dr. Centric prescribed him the anti-psychotic drug Thorazine, and on January 22, 2012, he was administered Thorazine without his knowledge and against his will.

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1 **a. involuntary psychiatric treatment and placement in the MHU after**
 2 **being characterized as mentally ill**

3 In *Vitek v. Jones*, 445 U.S. 480 (1980), the Supreme Court held that a due process
 4 liberty interest was implicated when an inmate was “characteriz[ed]...as a mentally ill patient
 5 and was transfer[ed] to [a mental health hospital to undergo] mandatory behavior modification
 6 treatment.” *Id.* at 488. In addition, it has been held that “[t]he due process clause of the
 7 Fourteenth Amendment substantively protects a person’s rights to be free from unjustified
 8 intrusions to the body, to refuse unwanted medical treatment and to receive sufficient
 9 information to exercise these rights intelligently.” *Benson v. Terhune*, 304 F.3d 874, 884 (9th
 10 Cir. 2002) (citing *White v. Napoleon*, 897 F.2d 103, 111 (3d Cir. 1990)) (internal citations
 11 omitted).

12 In this context, due process is satisfied if the inmate is provided:

13 (1) written notice that a transfer to a mental hospital was being considered;
 14 (2) a hearing, sufficiently after the notice, at which disclosure to the prisoner was
 15 made of the evidence being relied upon and at which an opportunity to be heard
 16 in person and to present documentary evidence was given; (3) an opportunity at
 17 the hearing to present testimony of witnesses by the defense and to confront and
 18 cross-examine witnesses called, unless good cause was shown for why such
 19 confrontation and cross-examination should not be permitted; (4) an
 20 independent decision maker; (5) a written statement by the fact finder as to the
 21 evidence relied on and the reasons for action; (6) the availability of qualified and
 22 independent assistance, which may be an attorney, but need not be; and
 23 (7) effective and timely notice of all the foregoing rights.
Meza v. Livingston, 607 F.3d 392, 407 (5th Cir. 2010) (citing *Vitek*, 445 U.S. at 494-95
 24 (majority opinion), 499-500 (Powell, J., concurring)).

25 Plaintiff asserts that he was admitted to the MHU, labeled mentally ill, and treated for
 26 mental illness without provision of the due process protections outlined in *Vitek v. Jones*.
 27 (Docs. # 5, # 6 at 6.) Defendants only argue that Plaintiff’s request for injunctive relief is moot,
 28 and did not present any argument as to whether Plaintiff’s claims have merit. Nor did they
 provide any documentary evidence purporting to demonstrate Plaintiff was provided with the
 procedural protections outlined in *Vitek*. Assuming the truth of Plaintiff’s assertion that he did
 not receive any of the procedural protections outlined in *Vitek v. Jones*, Plaintiff has
 demonstrated a likelihood of success on the merits with respect to his procedural due process

1 claim concerning his being labeled mentally ill; placed in the MHU and receiving treatment in
 2 the form of therapy against his will.

3 **b. Involuntary administration of anti-psychotic medication**

4 In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court held that an inmate
 5 has “a significant liberty interest in avoiding the unwanted administration of antipsychotic
 6 drugs under the Due Process Clause of the Fourteenth Amendment.” *Id.* at 221-22. However,
 7 “given the requirements of the prison environment, the Due Process Clause permits the State
 8 to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his
 9 will, if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical
 10 interest.” *Id.* at 227. The Supreme Court also outlined the “procedural protections [] necessary
 11 to ensure that the decision to medicate an inmate against his will is neither arbitrary nor
 12 erroneous.” *Id.* at 228. The decision whether to medicate an inmate against his will satisfies due
 13 process when facilitated by an administrative review by medical personnel not then involved
 14 in the inmate’s treatment. *Id.* at 233. Due process does not require a judicial hearing before an
 15 inmate may be involuntarily medicated. *Id.* at 228. Nor does it require a hearing conducted in
 16 accordance with the rules of evidence or a “clear, cogent, and convincing” standard of proof.
 17 *Id.* at 235. Instead, due process is satisfied if the inmate is provided with notice, the right to be
 18 present at an adversarial hearing, and the right to present and cross-examine witnesses. *Id.* at
 19 235. Appointment of counsel is not required; the provision of a lay adviser who understands
 20 the psychiatric issues involved is sufficient. *Id.* at 236.

21 The Ninth Circuit has found that the procedural protections outlined in *Washington v.*
 22 *Harper* may not apply in an emergency situation. See *Kulas v. Valdez*, 159 F.3d 453, 456 (9th
 23 Cir. 1998). There, the court appeared to agree that an emergency could potentially excuse
 24 compliance with notice and a pre-medication hearing, even though the facts in the case before
 25 it did not present an actual emergency.

26 Here, Plaintiff concedes that he was found to be mentally ill so as to be a danger to
 27 himself and others. (See Docs. # 5, # 6 at 2.) However, Plaintiff asserts that on January 2, 2012,
 28

1 a hearing was held without providing Plaintiff proper notice and due process protections set
2 forth in *Vitek v. Jones* or *Harper v. Washington*. (*Id.*) Plaintiff claims Defendants held another
3 procedurally infirm hearing on January 5, 2012; and he was kept in the MHU against his will.
4 (*Id.* at 3.) Plaintiff further asserts that he was then involuntarily prescribed anti-psychotic
5 medication by Dr. Centric on January 10, 2012. (*Id.*)

6 Again, Defendants do not present an argument as to the merits of Plaintiff's claim. Nor
7 have they provided any documentary evidence to establish compliance with the due process
8 protections outlined above. Therefore, assuming the validity of Plaintiff's allegations regarding
9 the failure to provide him with the due process protections outlined in *Washington v. Harper*
10 in connection with the administration of Thorazine, and the absence of an emergency situation,
11 the court finds Plaintiff has demonstrated a likelihood of success on the merits with respect to
12 this claim.

13 **2. Fourteenth Amendment Substantive Due Process-Count I**

14 In Count I, Plaintiff claims that various defendants violated his right to substantive due
15 process when they admitted and retained him in the MHU even though he is not mentally ill.
16 Plaintiff alleges that defendants Schober and an unidentified correctional officer took him into
17 the MHU to have him admitted and labeled mentally ill. He claims their actions were arbitrary,
18 unreasonable and without a logical penological purpose. He further alleges that on January 5,
19 2012, various unidentified doctors and nurses as well as defendants Fritz and Konrad held a
20 hearing and decided to retain Plaintiff in the MHU and this decision was arbitrary,
21 unreasonable and without a penological purpose because there was no evidence of Plaintiff
22 having a mental illness. Next, Plaintiff avers that on January 6, 2012, defendants Dr. Centric
23 and Fritz and various unidentified defendants held a therapy session which Plaintiff was forced
24 to attend against his will. Plaintiff claims this was arbitrary and unreasonable because these
25 defendants had the authority to release him but continued to subject him to mental health
26 treatment against his will.

27 Substantive due process protects individuals from arbitrary and unreasonable
28

1 government action which deprives any person of life, liberty, or property. *Kawaoka v. City of*
 2 *Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994). To establish a substantive due process
 3 violation, the government's action must be shown to be "clearly arbitrary and unreasonable,
 4 having no substantial relation to the public health, safety, morals, or general welfare." *Sinaloa*
 5 *Lake Owners v. Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (quoting *Village of Euclid v.*
 6 *Amber Realty Co.*, 272 U.S. 365, 295 (1926)); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir.
 7 1988). "[C]onduct intended to injure in some way unjustifiable by any government interest is
 8 the sort of official action most likely to rise to the conscience-shocking level." *County of*
 9 *Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (citation omitted). However, "[w]hether the
 10 point of the conscience-shocking is reached when injuries are produced with culpability falling
 11 within the middle range, following from something more than negligence but less than
 12 intentional conduct, such as recklessness or gross negligence...is a matter for closer calls." *Id.*

13 Plaintiff's conclusory statements that his substantive due process rights were violated
 14 do not cross the threshold of establishing he is likely to succeed on the merits of this claim.
 15 While Defendants did not present an argument regarding the merits of this claim, they did
 16 provide the court with some of Plaintiff's medical records for the relevant time period which
 17 at a minimum create a factual issue regarding the circumstances surrounding the mental health
 18 treatment and administration of anti-psychotic medication so as to preclude a finding that the
 19 government action in question was "clearly arbitrary and unreasonable." As a result, the court
 20 finds that Plaintiff has not demonstrated a likelihood of success on the merits of the substantive
 21 due process claim.

22 **3. First Amendment retaliation- Count III & Eighth Amendment safety-**
 23 **Count IV**

24 Plaintiff fails to address the likelihood of success on the merits with respect to these two
 25 claims.

26 **B. Likelihood of suffering irreparable harm**

27 Plaintiff must demonstrate that irreparable injury is likely in the absence of an

1 injunction. *Winter*, 555 U.S. at 20. “[A] preliminary injunction will not be issued simply to
 2 prevent the possibility of some remote future injury.” *Id.* at 22 (citations omitted).
 3 This factor is at the center of Defendants’ opposition. They argue that Plaintiff cannot
 4 establish a likelihood that he will suffer irreparable harm because he has not been prescribed
 5 anti-psychotic drugs since January 10, 2012, he was discharged from the MHU and no orders
 6 exist to place him in mental health housing, and he is not currently labeled as mentally ill. In
 7 addition, Defendants argue that the request for injunctive relief is moot because Plaintiff was
 8 transferred from NNCC, where the conduct in question took place, and no one at the facility
 9 where he is currently housed is a party to this action. (Doc. # 12 at 2-3.) While Plaintiff has
 10 named Defendant Cox, the Director of NDOC, Defendants argue that he has no knowledge of
 11 the events surrounding Plaintiff’s Complaint and provide his declaration to that effect. (See
 12 Doc. 12 at 2 n. 2, Doc. # 12-1 at 2.)

13 First, Plaintiff argues that while the prescription for anti-psychotic medication may have
 14 expired on February 10, 2012, Plaintiff was told by nurses and mental health counselors that
 15 the prescription was still valid. (See Doc. # 27 at 6.) In addition, he claims that while the
 16 prescription may have expired, it is likely he will be prescribed medication again because he
 17 was forced to attend a hearing to determine if he was to continue on the medication. (*Id.*)

18 Next, Plaintiff maintains it is still likely that he will be labeled as mentally ill and forced
 19 to receive mental health treatment. (Doc. # 27 at 8-9.) Plaintiff claims his mental health
 20 classification was only changed when he filed this motion. (*Id.* at 8.) In addition, he states that
 21 even though he was discharged from the MHU, he continued to be treated as mentally ill
 22 because he received visits from a mental health counselor. (*Id.*) He also claims that he was
 23 subjected to treatment on at least two occasions against his will when the counselor came to
 24 his cell. (*Id.* at 9.) In his supplemental brief, Plaintiff asserts that after he was transferred to
 25 ESP, he was classified as mentally ill again on July 19, 2012. (Doc. # 38 at 5.) Then he was
 26 reclassified as not mentally ill on August 10, 2012. (*Id.* at 6.) Plaintiff says this is evidence that
 27 there is a likelihood he will be reclassified as mentally ill in the future which will cause him to
 28

1 continue to suffer from the stigma of being labeled as such.

2 Finally, Plaintiff argues that it is still likely he will be transferred to mental health
 3 housing at ESP. (*Id.* at 10.)

4 First, the court will address Defendants' argument that Plaintiff's request for injunctive
 5 relief is moot because he has been transferred from NNCC, where the alleged constitutional
 6 infirmities took place, to ESP, and none of the Defendants are employed at ESP. (Doc. #12 at
 7 3.) The Ninth Circuit has acknowledged that a request for injunctive relief against officials at
 8 a particular prison facility becomes moot when the prisoner is moved from that prison;
 9 however, to the extent the request is asserted with respect to a "department-wide" official, i.e.,
 10 a director, regarding a policy that pervades the prison system, the request may proceed. See
 11 *Nelson v. Heiss*, 271 F.3d 891, 897 (9th Cir. 2001).

12 As a result of Plaintiff's transfer from NNCC to ESP, Plaintiff's request for injunctive
 13 relief is moot insofar as it is directed to defendants at NNCC. Defendants acknowledge that
 14 Plaintiff has named Director Cox as a defendant, but argue that the injunction should
 15 nevertheless be denied as moot because there is no basis to hold him liable for the alleged
 16 unconstitutional conduct at issue. Plaintiff, on the other hand, disputes this and argues that
 17 Director Cox did have knowledge of Plaintiff's admission to the MHU and the administration
 18 of anti-psychotic medication. (Doc. # 27 at 2-3.) In support of his position, Plaintiff provides
 19 communications between himself and his mother and Director Cox regarding these issues.
 20 (Doc. # 27 at 3; Doc. # 27 at 21; Doc. # 28-1; Doc. # 46 at 4.) While the court finds that Plaintiff
 21 has at least raised a factual issue regarding Director Cox's knowledge of Plaintiff's
 22 circumstances, so that the request for injunctive relief would otherwise be allowed to proceed
 23 against him, Plaintiff has still failed to establish it is likely he will suffer irreparable injury in
 24 the absence of an injunction.

25 Next, the court will address Defendants' argument that the request for injunctive relief
 26 is moot because Plaintiff has not been prescribed Thorazine since January of 2012, he was
 27 discharged from the MHU in January 2012, and is not currently labeled mentally ill.

28

1 Plaintiff is correct that voluntary cessation of allegedly illegal conduct does not moot a
 2 plaintiff's claim for injunctive relief. *Friends of the Earth, Inc.*, 528 U.S. 167, 189 (2000). Doing
 3 so would "leave the defendant free to return to his old ways." *Id.* Rather, a case does not
 4 become moot by a defendant's voluntary cessation of the allegedly illegal conduct unless the
 5 defendant satisfies the "heavy burden of persuading the court that the challenged conduct
 6 cannot reasonably be expected to start up again..." *Id.* That being said, a plaintiff is still tasked
 7 with establishing that he is "likely" to suffer irreparable harm, and not merely that injury is a
 8 "possibility." *See Winter*, 555 U.S. at 22; *see also Enyart v. National Conference of Bar*
 9 *Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2013) (citation omitted) (finding a likelihood of
 10 irreparable injury where plaintiff provided declaration that she would not be able to complete
 11 exam even with the use of some proposed accommodations which would likely lead to "the loss
 12 of the opportunity to pursue her chosen profession").

13 In *Washington v. Harper*, the seminal involuntary administration of anti-psychotic
 14 medication case, the respondent, like Defendants here, argued that the case was moot because
 15 the state had ceased the administration of anti-psychotic medication to the inmate. *See*
 16 *Washington*, 494 U.S. at 218. The Supreme Court dismissed that argument. *See id.* However,
 17 the facts present in *Washington* vary greatly from those presented here. In *Washington*, the
 18 Supreme Court noted that the inmate had been treated for mental illness from the time he was
 19 incarcerated, had been diagnosed with schizophrenia, and there was "no evidence that [he had]
 20 recovered from his mental illness." *Id.* Coupled with the fact that the inmate had been
 21 transferred to the mental health unit on two previous occasions during his period of
 22 incarceration, the Supreme Court concluded "there [was] a strong likelihood that [the inmate]
 23 may again be transferred to the Center" and "given his medical history, it [was] likely that,
 24 absent the holding of the Washington Supreme Court, Center officials would seek to administer
 25 antipsychotic medications pursuant [to their policy]." *Id.*

26 Here, Plaintiff's medical records indicate that he was prescribed Thorazine on January
 27 10, 2012, for thirty days, and the prescription was not renewed beyond that prescription period.
 28

1 (Doc. # 13-1 at 2-4.) Plaintiff was discharged from the MHU at NNCC on January 13, 2012, and
 2 has resided in segregated housing at ESP. (*Id.*, Doc. # 12-1 at 17.) Additionally, he is not
 3 currently characterized as mentally ill. (See Doc. # 38 at 6.) Plaintiff's belief, however sincere,
 4 that he will be classified as mentally ill, placed in the MHU, and prescribed Thorazine again,
 5 does not rise to the level of a *likelihood* of irreparable injury under these facts. The mere
 6 *possibility* that these things will occur at some point in the future does not support a request
 7 for injunctive relief. This does not mean that Plaintiff cannot continue to pursue his action for
 8 damages for the alleged infringement of his constitutional rights with respect to conduct he
 9 asserts was taken by Defendants in January of 2012. It only means that he has not made a
 10 showing of a likelihood of irreparable injury in the context of his request for prospective
 11 injunctive relief.

12 **C. Balance of hardships**

13 A party seeking injunctive relief "must establish...that the balance of equities tips in his
 14 favor." *Winter*, 555 U.S. at 20.

15 Plaintiff argues that it is likely he will be admitted to the MHU again and subjected to
 16 involuntary administration of medication and treatment which will result in Plaintiff suffering
 17 the stigmatizing consequences, mental distress, and mind alteration. (Docs. # 5, # 6 at 10-11.)
 18 Defendants failed to address the balance of hardships factor.

19 As indicated above, Plaintiff has merely established it is *possible* he may be placed in the
 20 MHU again and subject to involuntary medication and treatment, not the requisite *likelihood*
 21 that this will occur. In light of this, the court cannot conclude that the balance of hardships tips
 22 in Plaintiff's favor.

23 **D. Public Interest**

24 "In exercising their sound discretion, courts of equity should pay particular regard for
 25 the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555
 26 U.S. at 24 (quotation marks and citation omitted).

27 Plaintiff argues that it is in the public interest for NDOC officials to follow the law and
 28

1 assure that it's citizens rights are not being violated. (Docs. # 5, # 6 at 12.)

2 Given that Plaintiff has not established that it is *likely* he will be labeled mentally ill,
3 placed in the MHU and involuntarily administered anti-psychotic medication, the court finds
4 it is not in the public interest to entertain a request for injunctive relief, particularly when
5 Plaintiff seeks to extend such relief to persons who are not parties to this action.

6 **E. Conclusion**

7 The prerequisites for injunctive relief not having been met, Plaintiff's request for
8 injunctive relief should be denied.

9 **IV. RECOMMENDATION**

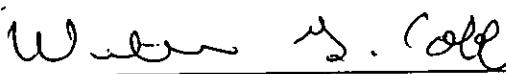
10 **IT IS HEREBY RECOMMENDED** that the District Judge enter an Order **DENYING**
11 Plaintiff's Motion for Temporary Restraining Order (Doc. # 5) and Preliminary Injunction
12 (Doc. # 6).

13 The parties should be aware of the following:

14 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the
15 Local Rules of Practice, specific written objections to this Report and Recommendation within
16 fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate
17 Judge's Report and Recommendation" and should be accompanied by points and authorities
18 for consideration by the District Court.

19 2. That this Report and Recommendation is not an appealable order and that any
20 notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the
21 District Court's judgment.

22 DATED: January 24, 2013

23 
24 WILLIAM G. COBB
25 UNITED STATES MAGISTRATE JUDGE
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